Supreme Court, U. S.
FILED
DEC 29 1978
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-482

THE HON. ROBERT K. SMITH, JUDGE, ET AL., ETC.,
Petitioners,

v.

STATE EX REL. DAILY MAIL PUBLISHING CO., ETC. ET AL.,
Respondents

THE HON. ROBERT K. SMITH, JUDGE, ET AL., ETC.,
Petitioners,

v.

DON MARSH, ET AL., THE DAILY GAZETTE CO., ETC. ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE WEST VIRGINIA
SUPREME COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI FILED SEPTEMBER 21, 1978
CERTIORARI GRANTED NOVEMBER 13, 1978

INDEX

Page

Notation Re Opinion Below 1

The Joint and Several Petition of the Daily Mail Publishing Co., Jack Maurice, and Mary Schnack for Writ of Prohibition in the Supreme Court of Appeals of West Virginia 2

Indictment for Misdemeanor in the Circuit Court of Kanawha County, and Exhibits 11

Petition of Don Marsh, W. G. Chilton, III, The Daily Gazette Company, a corporation, and Leslie H. Milam for Writ of Prohibition, in the Supreme Court of West Virginia 24

Indictment for Misdemeanor, in the Circuit Court for Kanawha County 28

Answer of the Honorable Robert K. Smith, Judge of the Circuit Court of Kanawha County, in the Supreme Court of Appeals of West Virginia 30

Demurrer to the Answer of the Respondent, in the Supreme Court of the State of West Virginia ... 32

Demurrer in the Supreme Court of Appeals of West Virginia 33

Prohibition 14158 35

Prohibition 14180 37

Prohibition 14158 39

Notation Re Opinion Below

The opinion below is reproduced in the Petition heretofore filed with this Court. A corrected and final opinion reproduced in the Reply to the petition of the Charleston Daily Mail. The latter opinion now appears in 248 S.E.2d 269 (1978).

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

AT CHARLESTON

In Prohibition Original Jurisdiction

THE STATE OF WEST VIRGINIA AT THE RELATION OF DAILY MAIL PUBLISHING CO., a West Virginia corporation, JACK MAURICE, and MARY SCHNACK, *Petitioners,*

vs.

THE HONORABLE ROBERT K. SMITH, THE HONORABLE THOMAS E. MCHUGH, Chief Judge, THE HONORABLE WILLIAM HERBERT BELCHER, THE HONORABLE PATRICK CASEY, THE HONORABLE ODEN F. GOSHORN, THE HONORABLE JOHN HEY, and THE HONORABLE A. ANDREW MACQUEEN, Judges of the Circuit Court of Kanawha County, West Virginia,

and

THE HONORABLE CLETUS B. HANLEY, Prosecuting Attorney of Kanawha County, West Virginia, *Respondents.*

The Joint and Several Petition of The Daily Mail Publishing Co., Jack Maurice, and Mary Schnack for Writ of Prohibition

TO THE HONORABLES, THE JUSTICES OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA:

Your joint and several Petitioners, Daily Mail Publishing Co., a West Virginia corporation, Jack Maurice and Mary Schnack, jointly and severally respectfully represent unto your Honors as follows:

1. Petitioner Daily Mail Publishing Co. is a West Virginia corporation with its principal office in Charleston, West Virginia, and Petitioners Jack Maurice and Mary Schnack are citizens, residents and taxpayers of Kanawha County, West Virginia, wherein Daily Mail Publishing Co.

owns and publishes six days a week, Monday through Saturday, a daily afternoon newspaper known as the Charleston Daily Mail. Although the Charleston Daily Mail is printed and circulated by Charleston Newspapers, an unincorporated joint venture of The Daily Gazette Company, owner and publisher of The Charleston Gazette, and Daily Mail Publishing Co., the news and editorial content of the Charleston Daily Mail and the Charleston Gazette are each under the separate and independent control of the Daily Mail Publishing Co. and The Daily Gazette Company, respectively, each of which operates through a separate staff of news and editorial employees. Your Petitioner Jack Maurice is and, at all times material herein, has been, Editor of the Charleston Daily Mail. Your Petitioner Mary Schnack is and, at all times material herein, has been a news reporter for the Charleston Daily Mail.

2. Respondent the Honorable Robert K. Smith, and the other Circuit Judges named in the caption hereto, are the duly elected, qualified and acting Circuit Judges of the Thirteenth Judicial Circuit of West Virginia, which Circuit is comprised of the County of Kanawha, and your Petitioners aver upon information and belief, that the indictment of these Petitioners, hereafter described, has been assigned to the Respondent Robert K. Smith, and your Petitioners have been ordered to appear before Judge Smith on March 21, 1978, at 9:30 a.m., EST.

3. The Respondent the Honorable Cletus B. Hanley is the duly appointed, qualified and acting Prosecuting Attorney for Kanawha County, West Virginia.

4. On March 1, 1978, the Grand Jurors in and for the County of Kanawha, serving during the January 1978 term of the Circuit Court of said County, returned an indictment against your Petitioners, a true copy whereof is attached hereto as Exhibit A and incorporated herein by reference, charging that your Petitioners ". . . on the 10th day of Februray, 1978, . . . in the said County of Kanawha,

did knowingly and unlawfully publish and cause to be published the name of Stuart Wayne Perrock, a child of the age of 14 years, in the Charleston Daily Mail, a newspaper of general circulation throughout the said County of Kanawha, in connection with a proceeding and while a proceeding under the provisions of Chapter 49 of the Code of West Virginia, as amended, was pending against this said Stuart Wayne Perrock . . . without a written order of said Circuit Court of Kanawha County . . . ."

5. The material facts relating to the publication of Perrock's name in the Charleston Daily Mail on Friday afternoon, February 10, 1978, as related to the Grand Jury of Kanawha County by your Petitioner Jack Maurice, under oath, in a voluntary appearance before that body on March 1, 1978, are substantially as follows:

(a) On the morning of Thursday, February 9, 1978, newsroom employees of the Charleston Daily Mail monitoring the police band radio frequency, learned that there had been a shooting at Hayes Junior High School in St. Albans, West Virginia. Mary Schnack, one of the Petitioners, and Chambers Williams, both Daily Mail reporters, and Daily Mail photographer Chet Hawes, were directed to the scene to cover the story.

(b) From these reporters the Daily Mail learned that there were several eye-witnesses to the death by gunshot of a juvenile student, Arthur Smith, in a school hallway that morning, and that the assailant who allegedly shot Smith was another juvenile student, allegedly Stuart Perrock. Notwithstanding the fact that the identity of Smith's alleged assailant was apparently known throughout the school and Perrock had been taken into custody, Petitioner Maurice was aware of the provision of W. Va. Code § 49-7-3 under which your Petitioners were indicted and made a decision not to use Perrock's name in the Daily Mail story about the event published in the Charleston Daily Mail in its edition of Thursday evening, February 9, 1978, a copy

of which story is attached hereto as Exhibit B and made a part of this Petition by reference.

(c) Early on the morning of February 10, 1978, as the news and editorial staff of the Charleston Daily Mail reported for work to produce the news and editorial content of that afternoon's edition of the Daily Mail, your Petitioners learned that it was already public knowledge that Stuart Wayne Perrock had been taken into custody and was being held in connection with the death of Arthur Smith, pending further proceedings pursuant to Chapter 49 of the West Virginia Code, as amended. The source of this information was as follows: (i) Petitioners Maurice and Schnack read the story in the Charleston Gazette on Friday morning, February 10, 1978, appearing under the headline "Youth Can't Be Charged With Murder", which was accompanied by a three column picture of Perrock in the custody of three Kanawha County Deputy Sheriffs; Perrock was identified by name in both the caption to the picture and the story, all of which appeared on page one of that paper, a copy of which is attached hereto as Exhibit C and incorporated herein by reference; (ii) Petitioner Schnack, on her way to work on the morning of February 10, 1978, heard Perrock's name used in connection with the same story in a radio broadcast from Station WVAF received on her car radio, and so reported to her Editor; (iii) Petitioner Schnack also was told by Lieutenant W. T. Markham of the Kanawha County Sheriff's Office that Perrock's name had been used in connection with the Smith slaying by WCHS radio on a Thursday broadcast, which report she passed along to her Editor; and (iv) David Greenfield, another news reporter employed by the Charleston Daily Mail, reported to Petitioners that he had heard Perrock identified as Smith's slayer in a radio broadcast from WCAW on Friday morning.

(d) Faced with the fact that it was then public knowledge that Stuart Wayne Perrock, a juvenile, was being de-

tained in connection with the death of Smith, Petitioner Maurice concluded that he must reevaluate his earlier decision not to use Perrock's name. After consulting associates in the Editorial Department of the Daily Mail who had input in the decision making process, Petitioner Maurice, at approximately 8:00 o'clock a.m., telephoned Daily Mail's legal counsel on First Amendment matters and recited to him the facts substantially as hereinbefore averred in this numbered paragraph of this Petition. Petitioner Maurice was advised by counsel that even if the statute prohibiting identification of Perrock in a newspaper, without a court order, was otherwise valid, the purpose of the statute was no longer possible of accomplishment and it was counsel's opinion that the Daily Mail was justified in no longer suppressing the use of Perrock's name.

(e) Petitioner Maurice thereafter decided to publish the juvenile's name and his decision was communicated to his associates and subordinates, including Petitioner Schnack. The Daily Mail story disclosing Perrock's name and picture, which was thereafter published in the Charleston Daily Mail in its Friday evening edition of February 10, 1978, is attached hereto as Exhibit D and made a part hereof by reference. The facts reported in Exhibit D, insofar as they are material herein, are true.

6. The West Virginia statutes, which are the sole legal bases for the indictment of your Petitioners, are Chapter 49, Article 7, Sections 3 and 20 of the West Virginia Code, as amended, which read as follows (with the relevant portion emphasized):

49-7-3

"Any evidence given in any cause or proceeding under this chapter, or any order, judgment or finding therein, or any adjudication upon the status of juvenile delinquent heretofore made or rendered, shall not in any civil, criminal or other cause or proceeding whatever in any court, be lawful or proper evidence against such child for any purpose whatsoever except in subsequent cases under this chapter involving the same child; *nor shall the name of any child, in connection with any proceedings under this chapter, be published in any newspaper without a written order of the court;* nor shall any such adjudication upon the status of any child by a juvenile court operate to impose any of the civil disabilities ordinarily imposed by conviction, nor shall any child be deemed a criminal by reason of such adjudication, nor shall such adjudication be deemed a conviction, nor shall any such adjudication operate to disqualify a child in any future civil service examination, appointment, or application."

49-7-20

"A person who violates an order, rule, or regulation made under the authority of this chapter, *or who violates a provision of this chapter for which punishment has not been specifically provided,* shall be guilty of a misdemeanor, and upon conviction shall be fined not ess than ten nor more than one hundred dollars, or confined in jail not less than five days nor more than six months, or both such fine and imprisonment."

7. Petitioners did not apply for an order from the Circuit Court of Kanawha County permitting the publication of Perrock's name. Petitioners aver, on information and belief, that to have done so would have compromised their position that such Court has no valid constitutional jurisdiction by virtue of W. Va. Code § 49-7-3 to exercise any prior restraint upon the Daily Mail publication of Perrock's name in the context of the facts hereinbefore alleged.

8. Your Petitioners are advised and believe that the indictment returned against them by the Grand Jurors of Kanawha County is a nullity and that the Respondents have no power to try or otherwise exercise any power over these Petitioners pursuant to said indictment because the

statute upon which the indictment is founded, insofar as it would operate to prohibit the Daily Mail publication of Perrock's name, is unconstitutional as violative of:

(a) Article 3, Section 7 of the West Virginia Constitution which reads as follows:

> "§ 7. No law abridging the freedom of speech, or of the press, shall be passed; but the legislature may by suitable penalties, restrain the publication or sale of obscene books, papers, or pictures, and provide for the punishment of libel, and defamation of character, and for the recovery, in civil actions, by the aggrieved party, of suitable damages for such libel, or defamation."

(b) Article 5 of the West Virginia Constitution.

(c) The First Amendment to the Constitution of the United States, which prohibits the Congress from making any law abridging freedom of speech or freedom of the press, made applicable to State action by the Fourteenth Amendment to the Constitution of the United States.

(d) The Equal Protection Clause of the West Virginia Constitution and the Fourteenth Amendment to the Constitution of the United States.

(e) Article 3, Section 10 of the West Virginia Constitution and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

9. Upon information and belief that unless prohibited by this Court, Respondents will proceed, without jurisdiction, to bring your Petitioners to trial pursuant to a void indictment based on a void statute. No West Virginia court other than the Supreme Court of Appeals of West Virginia has jurisdiction to issue a Writ of Prohibition against one or more of the judges of the Circuit Court of Kanawha County.

10. Petitioners do not now believe that taking of evidence will be necessary.

WHEREFORE, your Petitioners pray:

1. That a rule be issued by this Honorable Court, directed to the Respondents, to show cause, if they or any of them can, why the said honorable judges of the Circuit Court of Kanawha County, as aforesaid, should not be prohibited from entering any order or taking any other action with respect to the indictment of these Respondents attached hereto as Exhibit A; and that a rule also be issued by this Honorable Court, directed to the Respondent, the Honorable Cletus B. Hanley, Prosecuting Attorney of Kanawha County, to show cause, if he can, why he should not be prohibited from further prosecuting or seeking to prosecute these Respondents or any of them by reason of the publication in the Charleston Daily Mail of February 10, 1978, of the name of Stuart Wayne Perrock, an infant, in connection with a proceeding under the provisions of Chapter 49 of the Code of West Virginia.

2. That this Honorable Court enter an Order suspending, until final decision of this cause by this Honorable Court, the proceedings sought to be prohibited hereby.

3. That after the Respondents shall have had an opportunity to respond to such rule, a Writ of Prohibition may be awarded to your Petitioner, prohibiting all of the Respondents from entering any order or taking any action with respect to any further proceedings against these Petitioners, or any of them, by reason of the aforesaid indictment, excepting only such order or action as may be appropriate, just and proper to void said indictment and to restore the criminal records of each of these Petitioners to their former status, as if said indictment had never been returned.

4. That this Honorable Court do give your Petitioners and each of them such other and further relief as it may deem to be appropriate and as this case may require.

DAILY MAIL PUBLISHING CO., a West Virginia corporation, JACK MAURICE, and MARY SCHNACK

By Counsel

/s/ F. PAUL CHAMBERS
F. Paul Chambers

/s/ MICHAEL A. ALBERT
Michael A. Albert

/s/ ALVIN L. EMCH
Alvin L. Emch

/s/ DANIEL L. LARCAMP
Daniel L. Larcamp
JACKSON, KELLY, HOLT & O'FARRELL
1500 One Valley Square
P. O. Box 553
Charleston, West Virginia 25322

Counsel for Petitioners

[Certificate of Service deleted in printing]

[Subscriptions deleted in printing]

Exhibit A

No.

THE CIRCUIT COURT OF KANAWHA COUNTY

JANUARY TERM, 1978

STATE OF WEST VIRGINIA

v.

JACK MAURICE, DAILY MAIL PUBLISHING CO., a corporation and MARY SCHNACK

Indictment for Misdemeanor

The Grand Jurors of the State of West Virginia, in and for the body of the County of Kanawha, and now attending the said Court, upon their oaths present, that JACK MAURICE, DAILY MAIL PUBLISHING CO., a corporation and MARY SCHNACK, on the 10th day of February, 1978, and prior to the date of the finding of this indictment, in the said County of Kanawha, did knowingly and unlawfully publish and cause to be published the name of Stuart Wayne Perrock, a child of the age of fourteen years in the Charleston Daily Mail, a newspaper of general circulation throughout the said County of Kanawha, in connection with a proceeding and while a proceeding under the provisions of Chapter 49 of the Code of West Virginia, as amended, was pending against the said Stuart Wayne Perrock, a child of the age of fourteen years, in the Circuit Court of Kanawha County, without a written order of said Circuit Court of Kanawha County, against the peace and dignity of the State.

Found at the JANUARY Term of said Court, 1978, upon the information of Jack Maurice, Charleston, West Virginia.

Exhibit B

HAYES SCHOOLMATE HELD

Junior High Student Slain

By MARY SCHNACK
And CHAMBERS WILLIAMS
Of The Daily Mail Staff

A 14-year-old boy was apprehended today in the woods near Hayes Junior High School about three hours after he allegedly shot and killed a 15-year-old ninth grade in a hallway at the St. Albans school.

Killed at 7:55 a.m., minutes before classes were to begin, was Arthur Clinton Smith, son of Mr. and Mrs. Frazier Carl Smith of Coal River Road, St. Albans. The boy was shot once in the center of the chest with a .22-caliber pistol and died a few minutes later on the hallway floor outside the gymnasium, according to Lt. W.T. Markham of the Kanawha County sheriff's office.

The victim lived with this parents in a trailer within a block of the school.

The shooting momentarily sent panic through the neighborhood, and parents who heard about the incident rushed to the school to take their children home. Some parents feared that children who witnessed the shooting would be emotionally upset. Some children were in tears when they met their parents.

Markham said the suspect fled the building, and than ran across Strawberry Road and up a wooded hilside. Seven studlents witnessed the shooting, he said.

The suspect was chased by sheriff's deputies on foot and state police in a helicopter. He was found and returned to the school in the helicopter at 11:15 a.m., and was taken to the school guidance office for questioning. The youth emerged from the helicopter handcuffed and surrounded by law enforcement officers.

Police, who were tracking the suspect by his footprints, said they found a message scrawled in the snow, which read, "Tell Smith I'm sorry."

Markham said he was told the victim and his assailant had been at odds because of an incident at the school in December in which a bulletin board was set afire. The Smith youth was subsequently cited in juvenile court for arson in the incident, authorities said.

Witnesses told authorities the two exchanged words just before Smith was shot. Markham said there was no scuffle.

However, Markham said that within the past three weeks several fistfights had occurred involving Smith, the suspect and two other youths.

Markham said that authorities are trying to determine how the juvenile obtained the pistol.

The victim's grandmother, Icy Deweese, who lives next door to the school on Coal River Road, was present when her grandson's body was placed in an ambulance.

"He spent last night with me," she said. "Everything seemed fine. He even emptied the garbage and burned some papers for me. He kept things to himself."

The Smith family's trailer is next door to Mrs. Deweese's house. She added that she was close to him and knew of no problems he was having at school.

F. Douglas Stump, president of the Kanawha County Board of Education, said that all students were seated in their homerooms after the incident. Classes resumed at 11 a.m. "It's highly unusual for a gun to be on a school facility but highly impossible to protect against it," he said.

Exhibit C

Gazette Photo by DAVID VIC

HANDCUFFED Stewart Wayne Perrock is escorted to a police car by deputies after being charged Thursday in the shooting death of a fellow student at Hayes Junior High School in St. Albans.

In St. Albans School Incident

Youth Can't Be Charged With Murder

By Leslie H. Milam
Staff Writer

A 14-year-old St. Albans youth arrested Thursday following the shooting death of a fellow student at Hayes Junior High School can't be charged with murder.

The youth, identified as Stewart Wayne Perrock of Browns Creek near St. Albans, is being held in the Dunbar Child Shelter in lieu of $50,000 bond. He is scheduled to appear next Thursday before Chief Circuit Judge Thomas McHugh.

Lt. W. T. Markham said the youth was arrested on a juvenile delinquency charge after a petition was filed charging him with murder.

A spokesman for the state medical examiner's office in South Charleston said the victim of the shooting, Arthur Clinton Smith, 15, was shot three times in the chest.

The spokesman the autopsy indicated that the gun, a .22-caliber pistol, was against Smith's body when two of the shots were fired and that the bullets struck the Smith youth's heart.

Deputies Said the shooting occurred shortly after 8 a.m. inside the school on Strawberry Road in St. Albans just outside the school gymnasium. Seven students witnessed the shooting.

See "Don Marsh on Newspapering" on Page 4A.

Following the shooting, deputies said, the suspect ran from the school. Deputies tracked the youth through the snow and at one point found a message scrawled in the snow: "Tell Smith I'm sorry."

Shortly after the message was found, investigators said, state policemen in a helicopter spotted the suspect near the river bank not far from the school. He was arrested and returned to the school for questioning.

Deputies said they recovered the pistol and are attempting to determine where the weapon was obtained.

Markham said he was told trouble had occurred previously between the two youths and that there had been several fistfights involving Smith, the suspect and two other boys.

Markham said one report indicated Smith and the suspect had been arguing since a bulletin board at the school was set on fire in December. The Smith youth was cited for arson in the incident, deputies added.

One Investigator said Perrock was a witness in the arson case and was to have testified against Smith.

Smith's grandmother, Mrs. Icy Deweese, who lives near the school, came to the school about two hours after the shooting. "Oh God, I can't believe this. Everything was fine. He even emptied the garbage for me and burned some papers. I just found out about this and I can't believe it's happened."

Kanawha County Sheriff G. Kemp Melton said the investigation of the case is being complicated by the laws dealing with juveniles. "I have been asked to testify at an open hearing Wednesday before the House Judiciary Committee and I will testify. I think some changes need to be made in these laws."

Because Perrock is a juvenile, he can only be charged with juvenile delinquency. If he is found guilty, the maximum penalty Perrock can be given is to be sentenced to a juvenile detention center until he is 18.

Smith is survived by his parents, Mr. and Mrs. Frazier Smith of St. Albans; brothers, Denziel of St. Albans and

Wayne at home; grandparents, Mrs. Icy Deweese of St. Albans, Homer Deweese of Hometown.

Friends may call after 3 p.m. Saturday at Casdorph-Curry Funeral Home in St. Albans.

DON MARSH ON NEWSPAPERING

A Juvenile Issue

Elsewhere in this edition of the Gazette is a story about the shooting death Thursday of a ninth grade student at Hayes Junior High School in St. Albans. The story says that Stewart Perrock, 14, a fellow student, has been arrested.

It is against the law to publish names of juveniles charged with crimes in West Virginia. When we decided to use Perrock's name, we decided to break the law.

Nelson Sorah, the city editor, asked the most disturbing question. What gives us the right to choose which law we will obey and which law we will ignore?

I'm not sure that there is an acceptable answer. My own feeling is that the public interest in being informed of acts of violence in schools outweighs the undesirability of breaking a law, particularly a bad one.

I know nothing of what went on between the two boys before the shooting. My instinct as a parent is that the tragedy is almost as great for the arrested boy as it is for the dead one.

On the other hand, I am not sure the interest of society is served by a law that limits the charge in the case to juvenile delinquency and the sentence to no more than four years—until the accused youth is 18. It is social work legislation. While I don't mean to use the St. Albans case as an example, the state juvenile statute is the kind of law that leaves juveniles almost immune from punishment in areas where youth crime is a serious problem.

There is no single answer to Sorah's question that fully explains the reason that we are using the name of the arrested boy. Perhaps the decision was shaded by the urge to report a story, any story, as fully as possible. (I understand that WCHS used the name early in the day and then removed it when someone there realized they might be doing something illegal.) Perhaps those of us who made the decision were influenced by a kind of scoop mentality that makes us want to rush into print with whatever we know. Maybe the decision was simply wrong.

But it is difficult for me to believe that printing the name can damage the youth or increase his problem. I am sure that everyone in the St. Albans area knows his name and what he is charged with doing. I think it is a legalistic ficton for us to limit ourselves to "a 14-year-old youth" or "the juvenile suspect" when we report on the youngster who is charged.

My opinion was part of the consensus to use the name. I think one of the ground rules for those who violate a law should be that they are willing to pay whatever penalty is required. As an example. I believe that reporters who don't want to reveal sources when judges require them to should be prepared to go to jail.

However, I think a very strong case can be made that the existing restrictions on printing the names of juveniles charged with crimes are unwise and possibly illegal. If it comes to it, the Gazette is willing to do whatever is necessary to have that belief tested as fully as courts allow.

Exhibit D

CBs And Cycles

Slain Boy Had A Typical Teen's Interests

By Mary Schnack
Of The Daily Mail Staff

In many respects he was a normal 14-year-old who enjoyed rock music, motorcycles and talking on the CB, which was what he was doing Thursday morning an hour before he left for Hayes Junior High School in St. Albans.

In a hallway at school shortly before classes began, Arthur Smith died of three gunshot wounds in the chest.

His mother, Mrs. Frazier Smith of Coal River Road, said he would turn on the radio first thing in the morning, and after he came home from school; the CB, she said, consumed much of his spare time. His handle was "Pinball Wizard."

"This is so uncalled for. I'm too upset to know what to do," Mrs. Smith said today, sobbing, speaking with great difficulty about her son's life.

Stuart Wayne Perrock, 14, of Browns Creek, is being held in the Dunbar Child Shelter in lieu of $50,000 bond in connection with the shooting. Chuck Miller, Kanawha County assistant prosecuting attorney, said Perrock is charged with an "act of juvenile delinquency by virtue of committing a murder."

Miller said a juvenile must be over 16 to be tried as an adult. The most severe penalty a juvenile charged with delinquency can receive is incarceration in a juvenile center until he is 18, Miller added.

A preliminary hearing for Perrock will be held Thursday before Kanawha Chief Circuit Judge Thomas McHugh. Miller said it will be determined at the hearing if there is

enough evidence, or probable cause, to hold Perrock on the charge.

Perrock and Smith had a brief exchange of words minutes before classes were to begin at 8:10 a.m., said Lt. W.T. Makham of the Kanawha County sheriff's office.

Markham said three shots from a .22 caliber pistol were fired at close range into Smith's chest. The gun was directly against his chest when at least one shot was fired, Markham added.

Smith died within four minutes after being struck, Markham said.

Seven students, including Perrock's bother, witnessed the shooting, Markham said.

Sheriff's deputies are checking into a lead they obtained this morning concerning the gun's origin, Markham said. He said authorities do not believe the gun was obtained from the suspect's parents.

After the shooting, Markham said Perrock fled the school and crossed Strawberry Road and ran into the woods. Deputies, who were following the boy's footsteps, found a message scrawled in the snow which read, "Tell Smith I'm sorry."

Approximately three hours later, Perrock was spotted by state police Trooper Don Cook, who was patrolling the area in his car. Cook was on Coal River Road and Perrock was on the opposite bank of Coal River.

According to Trooper Don Caldwell, Cook radioed in that he had found the boy and while a state police helicopter was on its way to pick him up, Cook persuaded the boy to give himself up.

When found, Perrock had a .22 caliber pistol and a knife, Markham said.

Perrock was returned to the school for questioning, Markham said, because his mother was there waiting for him and he needed a dry set of clothes.

Smith had been arrested on a juvenile charge for arson in December in connection with a bulletin board in the school that had been set afire, Markham said. Fistfights between Smith, Perrock and two other boys had been occurring for the past three weeks, he added. "They had had a fight two or three times," he said. "It was two young boys slapping around on each other."

Mrs. Smith said she was aware of Arthur's problems at school. "I've pleaded with the school and school board officials to get this straightened out," she said. "This is what it's come to. I've talked to people about this going on."

She said she knew of a fued between Smith and Perrock. "He (Arthur) said he wanted to whip him, which most boys would say if they were fighting. He told his daddy that Stuart had threatened him."

After the bulletin board incident, Mrs. Smith said she had got the papers and planned to borrow money to send Arthur to a Christian school. "But he said he wanted to go to Hayes because all his friends were there.

"He was well-liked. People came by all last evening that he had been good friends with. We didn't even know all of them. A lot of them had never met Arthur either, they just talked to him on the CB."

The Smith family lives several miles from the school on Coal River Road and Arthur's grandmother, Icy Deweese, lives in a trailer behind the home. On Thursday, Mrs. Deweese said they lived next door to the school. "She was so upset she got things confused," Mrs. Smith said.

The Smith home has stereo and radio speakers in almost every room, she said, because working on the radio and stereo were among his hobbies. "He loved music, mostly

hard rock. His favorite groups were Styx and Lynyrd Skynyrd but he liked all of it, except he wasn't much for country and western."

Mrs. Smith said she and her husband prefer country-western music, so they often teased their son about his musical !!!!!

"He was always working on someone's bike, too," she said. "He had a motorcycle he's been riding for three years. Last year the motorcycle broke down and he went back to riding his 10-speed."

Arthur has gone hunting with his father ever since he could walk, she said. "He loves to hunt. The winter before last, he caught a deer around here. He saved up his money when he was 10 years old to buy his first gun. He had a rifle and a shotgun. His father taught him how to use it.

"It's kind of ironic because he was shot. But he was always very cautious with his gun. He wasn't allowed to come back out of the woods with it loaded. He always knew the safety measures."

Mrs. Smith said she didn't know what she'd do now that her youngest boy is gone. "I just know I lost my son," she said.

Surviving Smith are his parents, Mr. and Mrs. Frazier Smith of St. Albans; brothers, Denziel of St. Albans and Wayne at home; grandparents, Mrs. Icy DeWeese of St. Albans, Mr. Homer DeWeese of Hometown.

Friends may call Saturday after 3 p.m. in Casdorph-Curry Funeral Home, St. Albans.

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DON MARSH, W. E. CHILTON, III, THE DAILY GAZETTE COMPANY, a corporation, and LESLIE H. MILAM, *Petitioners,*

v.

HON. ROBERT K. SMITH, JUDGE OF THE CIRCUIT COURT OF KANAWHA COUNTY, *Respondent.*

Filed April 4, 1978

Petition of Don Marsh, W. E. Chilton, III, The Daily Gazette Company, a corporation, and Leslie H. Milam for Writ of Prohibition

---

TO THE HONORABLES, THE JUSTICES OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA:

The Petitioners allege as follows:

1. The Petitioner, the Daily Gazette Company, is a West Virginia corporation, with its principal place of business in Charleston, West Virginia, and owns and publishes the Charleston Gazette, a morning newspaper distributed throughout the State, and is responsible for the news and editorial content of that paper.

2. The Petitioner, Don Marsh, a citizen, resident and taxpayer of Kanawha County, West Virginia, is, and at all times herein mentioned, was Editor of the Charleston Gazette.

3. The Petitioner, W. E. Chilton, III, is and at all times herein mentioned, was Publisher of the Charleston Gazette.

4. The Petitioner, Leslie H. Milam, is and at all times herein mentioned, was a news reporter for the Charleston Gazette.

5. The Respondent is a Circuit Judge for Kanawha County.

6. The attached indictment was returned by the Kanawha County Grand Jury during the January, 1978 term of court.

7. At 10:30 o'clock a.m. on the day of the shooting, Leslie Milam was contacted by Don Marsh who instructed him that a shooting had taken place at Hayes Junior High School in St. Albans and assigned him to cover the story.

Milam went to Hayes Junior High School and obtained the story. Perrock's name was given to him by one of the policemen attending the accident.

Although Milam was aware of the statutory proscription against publication of juvenile names, he discussed the prospect of publication of Perrock's name with Chilton and Marsh and, since the information was already common knowledge, due to the many eye-witnesses, they jointly decided to go ahead and publish Perrock's name without seeking a court order pursuant to the statute.

The name appeared in the next days issue, a part of which is attached hereto as Exhibit A.

8. Upon information and belief that unless prohibited by this Court, Respondents will proceed, without jurisdiction, to bring your Petitioners to trial pursuant to a void indictment based on a void statute. No West Virginia court other than the Supreme Court of Appeals of West Virginia has jurisdiction to issue a Writ of Prohibition against a Judge of the Circuit Court of Kanawha County.

9. The petitioners did not obtain a court order before publishing Perrock's name since the statute which ordered such compliance is an unconstitutional restraint on the petitioners' right to free speech.

10. The petitioners submit that the indictment returned against them by the Grand Jury of Kanawha County is

null and void and that, due to its constitutional deficiency, the respondents should be prohibited from proceeding against them on such indictment.

11. The indictment is unconstitutional in that it violates:

a) Article 3, Section 7 of the West Virginia Constitution which reads as follows:

> "§ 7. No law abridging the freedom of speech, or of the press, shall be passed; but the legislature may by suitable penalties, restrain the publication or sale of obscene books, papers, or pictures, and provide for the punishment of libel, and defamation of character, and for the recovery, in civil actions, by the aggrieved party, of suitable damages for such libel, or defamation."

b) Article 5 of the West Virginia Constitution.

c) The First Amendment to the Constitution of the United States, which prohibits the Congress from making any law abridging freedom of speech of the press, made applicable to State action by the Fourteenth Amendment to the Constitution of the United States.

d) The Equal Protection Clause of the West Virginia Constitution and the Fourteenth Amendment to the Constitution of the United States.

e) Article 3, Section 10 of the West Virginia Constitution and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

12. The Petitioners aver that upon information and belief, the respondents will proceed to try the Petitioners under this indictment that is based on an unconstitutional statute, and that, therefore, their proper remedy is to petition this court for a writ of prohibition pursuant to West Virginia Code § 53-1-1, and that no evidentiary procedures will be necessary.

WHEREFORE, the Petitioners pray:

1. That this Honorable Court issue a rule directing the Respondents to show cause, why such a prohibition should not be granted to the petitioners.

2. That after the respondents have responded to this the Petitioners be awarded the writ of prohibition and that said indictment be declared void and all of this proceeding be expunged from the records of each of the individual Petitioners.

3. That the proceedings in the court below be ordered suspended until this Petition is adjudicated.

4. Such other relief as this court deems necessary and proper.

DON MARSH, W. E. CHILTON, III,
THE DAILY GAZETTE COMPANY, a
corporation, and LESLIE H. MILAM

By Counsel

/s/ RUDOLPH L. DITRAPANO
DITRAPANO, MITCHELL, LAWSON & FIELD
604 Virginia Street, East
Charleston, West Virginia
Counsel for Petitioner

[Certificate of Service deleted in Printing]

[Subscriptions deleted in printing]

No. CR-78-M-6

THE CIRCUIT COURT
OF KANAWHA COUNTY

JANUARY TERM, 1978

STATE OF WEST VIRGINIA

v.

DON MARSH, W. E. CHILTON, III, THE DAILY GAZETTE COMPANY, a corporation, and LESLIE H. MILAM

Indictment for Misdemeanor

State of West Virginia, Kanawha County, ss:

IN THE CIRCUIT COURT OF SAID COUNTY:

The Grand Jurors of the State of West Virginia, in and for the body of the County of Kanawha, and now attending the said Court, upon their oaths present, the DON MARSH, W. E. CHILTON, III, THE DAILY GAZETTE COMPANY a corporation, and LESLIE H. MILAM, on the 10th day of February, 1973, and prior to the date of the finding of this indictment, in the said County of Kanawha, did knowingly and unlawfully publish and cause to be published the name of Stuart Wayne Perrock, a child of the age of fourteen years in The Charleston Gazette, a newspaper of general circulation throughout the said County of Kanawha, in connection with a proceeding and while a proceeding under the provisions of Chapter 49 of the Code of West Virginia, as amended, was pending against the said Stuart Wayne Perrock, a child of the age of fourteen years, in the Circuit Court of Kanawha County, without a written order of said Circuit Court of Kanawha County, against the peace and dignity of the State.

Found at the JANUARY Term of said Court, 1978, upon the information of

Detective David Johnson, KCSD, Charleston, West Virginia

Don Marsh, Charleston, West Virginia

sworn in open Court and sent before the Grand Jury to give evidence to that body.

CLETUS B. HANLEY
Prosecuting Attorney

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

AT CHARLESTON

DON MARSH, W. E. CHILTON, III, THE DAILY GAZETTE COMPANY, a corporation, and LESLIE H. MILAM, *Petitioners,*

v.

HONORABLE ROBERT K. SMITH, JUDGE OF THE CIRCUIT COURT COURT OF KANAWHA COUNTY, *Respondent.*

Answer of the Honorable Robert K. Smith, Judge of the Circuit Court of Kanawha County, West Virginia

(1) The Respondent admits the allegations of paragraph one of the petition.

(2) The Respondent admits the allegations of paragraph two of the petition.

(3) The Respondent admits the allegations of paragraph three of the petition.

(4) The Respondent admits the allegations of paragraph four of the petition.

(5) The Respondent admits the allegations of paragraph five of the petition.

(6) The Respondent admits the allegations of paragraph six of the petition.

(7) The Respondent denies the allegations of paragraph seven of the petition, wherein the petitioners allege that... "since the information was already common knowledge, due to the many eye-witnesses, they jointly decided to go ahead and publish Perrock's name without seeking a court order pursuant to the statute."...

(8) The Respondent denies the allegations of paragraph eight of the petition.

(9) The Respondent denies the allegations of paragraph nine of the petition.

(10) The Respondent denies the allegations of paragraph ten of the petition.

(11) The Respondent denies the allegations of paragraph eleven of the petition.

(12) The Respondent denies the allegations of paragraph twelve of the petition.

Wherefore, the respondent prays that the petition filed against him be dismissed and the Writ of Prohibition as prayed for in the petition be denied, with his costs expended.

ROBERT K. SMITH, JUDGE OF
THE CIRCUIT COURT OF KANAWHA
COUNTY, WEST VIRGINIA

By Counsel

/s/ CLETUS B. HANLEY
CLETUS B. HANLEY, PROSECUTING
ATTORNEY FOR KANAWHA COUNTY,
COUNSEL FOR THE RESPONDENT

IN THE SUPREME COURT OF THE STATE OF WEST VIRGINIA

DON MARSH, W. E. CHILTON, III, THE DAILY GAZETTE COMPANY, a corporation, and LESLIE H. MILAM, *Petitioners,*

v.

HONORABLE ROBERT K. SMITH, JUDGE OF THE CIRCUIT COURT OF KANAWHA COUNTY, *Respondent.*

Demurrer to the Answer of the Respondent

The petitioners say that the Answer of the Respondent is not sufficient in law, for the following reason:

That it is not material to the case of the petitioners that petitioners rely on that allegation in paragraph seven of the petition and denied by the respondent that "since the information was already common knowledge, due to the many eye-witnesses, they jointly decided to go ahead and publish Perrock's name without seeking a court order pursuant to the statutes".

DON MARSH, W. E. CHILTON, III, THE DAILY GAZETTE COMPANY, a corporation, and LESLIE H. MILAM

By Counsel

/s/ RUDOLPH L. DiTRAPANO
DiTRAPANO, MITCHELL, LAWSON & FIELD
604 Virginia Street, East

Charleston, West Virginia 25301

Counsel for Petitioners

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

AT CHARLESTON

IN PROHIBITION ORIGINAL JURISDICTION

THE STATE OF WEST VIRGINIA AT THE RELATION OF DAILY MAIL PUBLISHING CO., a West Virginia corporation, JACK MAURICE, and MARY SCHNACK, *Petitioners,*

THE HONORABLE ROBERT K. SMITH, THE HONORABLE THOMAS E. McHUGH, Chief Judge, THE HONORABLE WILLIAM HERBERT BELCHER, THE HONORABLE PATRICK CASEY, THE HONORABLE ODEN F. GOSHORN, THE HONORABLE JOHN HAY, and THE HONORABLE A. ANDREW MacQUEEN Judges of the Circuit Court of Kanawha County, West Virginia,

and

THE HONORABLE CLETUS B. HANLEY, Prosecuting Attorney of Kanawha County, West Virginia, *Respondents.*

Demurrer

The Demurrer of the Respondents to the petition of the Petitioners.

The Respondents say that the petition is not sufficient in law, for the following reasons:

(1) Chapter 49, Article 7, Section 3 and 20 of the Code of West Virginia, as amended is not unconstitutional and does not violate Article 3, Section 7, of the West Virginia Constitution; nor Article 5 of the West Virginia Constitution; nor the First Amendment to the Constitution of the United States; nor the Equal Protection Clause of the West Virginia Constitution and the Fourteenth Amendment to the Constitution of the United States; nor Article

3, Section 10 of the West Virginia Constitution and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

Respondents

By Counsel

/s/ Cletus B. Hanley
Cletus B. Hanley, Prosecuting
Attorney for Kanawha County,
West Virginia, Counsel for Respondents

State of West Virginia

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 13th day of March, 1978, the following order was made and entered, to-wit:

Prohibition

14158

State of West Virginia ex rel. Daily Mail Publishing Co., a West Virginia corporation, Jack Maurice, and Mary Schnack, *Relators*

v.

The Honorable Robert K. Smith, The Honorable Thomas E. McHugh, Chief Judge, The Honorable William Herbert Belcher, The Honorable Patrick Casey. The Honorable Oden F. Goshorn, The Honorable John Hey, and The Honorable A. Andrew McQueen, Judges of the Circuit Court of Kanawha County, West Virginia, and The Honorable Cletus B. Hanley, Prosecuting Attorney of Kanawha County, West Virginia, *Respondents*

On a former day, to-wit, March 7, 1978, came the petitioners, Daily Mail Publishing Co., a West Virginia corporation, Jack Maurice, and Mary Schnack, by Jackson, Kelly, Holt & O'Farrell, F. Paul Chambers, Michael A. Albert, Alvin L. Emch and Daniel L. Larcamp, their attorneys, and presented to the Court their petition and exhibits, with certificate of service, and note of argument in support thereof, praying for a writ of prohibition to be directed against the respondents, The Honorable Robert K. Smith, The Honorable Thomas E. McHugh, Chief Judge, The Honorable William Herbert Belcher, The Honorable Patrick Casey, The Honorable Oden F. Goshorn, The Honorable John Hey, and The Honorable A.

Andrew MacQueen, Judges of the Circuit Court of Kanawha County, West Virginia, and The Honorable Cletus B. Hanley, Prosecuting Attorney of Kanawha County, West Virginia, as therein set forth. Upon consideration whereof, the Court is of opinion that a rule should be awarded herein. It is therefore considered and ordered that a rule do issue, directed against The Honorable Robert K. Smith, The Honorable Thomas E. McHugh, Chief Judge, The Honorable William Herbert Belcher, The Honorable Patrick Casey, The Honorable Oden F. Goshorn, The Honorable John Hey, and The Honorable A. Andrew MacQueen, Judges of the Circuit Court of Kanawha County, West Virginia, and The Honorable Cletus B. Hanley, Prosecuting Attorney of Kanawha County, West Virginia, returnable before this Court at its court room in the City of Charleston, County of Kanawha, at ten o'clock a.m., on Tuesday, the 16th day of May, 1978, commanding and directing the said respondents to show cause, if any they can, why a writ of prohibition should not be awarded against them as prayed for by the relators in their said petition; and all further proceedings are stayed until further order of the Court.

Service of a copy of this order upon the respondents aforesaid, shall have the same effect as the service of a formal rule. A True Copy.

Attest: (ILLEGIBLE)

Clerk Supreme Court of Appeals

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 4th day of April, 1978, the following order was made and entered, to-wit:

PROHIBITION

14180

DON MARSH, W. E. CHILTON, III, THE DAILY GAZETTE COMPANY, a corporation, and LESLIE H. MILAM, *Relators*

v.

HON. ROBERT K. SMITH, Judge of the Circuit Court of Kanawha County, *Respondent*

This day came the relators, Don Marsh, W. E. Chilton, III, The Daily Gazette Company, a corporation, and Leslie H. Milam, by DiTrapano, Mitchell, Lawson & Field and Rudolph L. DiTrapano, their attorneys, and presented to the Court their petition and exhibit, with certificate of service, and note of argument in support thereof praying for a writ of prohibition to be directed against the respondent, Hon. Robert K. Smith, Judge of the Circuit Court of Kanawha County, as therein set forth. Upon consideration whereof, the Court is of opinion that a rule should be awarded herein. It is therefore considered and ordered that a rule do issue, directed against Hon. Robert K. Smith, Judge of the Circuit Court of Kanawha County, returnable before this Court at its court room in the City of Charleston, County of Kanawha, at ten o'clock a.m., on Tuesday, May 16, 1978, commanding and directing the said respondent to show cause, if any he can, why a writ of prohibition should not be awarded against him as prayed for by the relators in their said petition; and all further proceedings are stayed until the further order of the Court.

Service of a copy of this order upon the respondent aforesaid, shall have the same effect as the service of a formal rule.

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 27th day of June, 1978, the following order was made and entered, to-wit:

PROHIBITION

14158

STATE OF WEST VIRGINIA EX REL. DAILY MAIL PUBLISHING CO., a West Virginia corporation, JACK MAURICE, and MARY SCHNACK, *Relators*

v.

THE HONORABLE ROBERT K. SMITH, THE HONORABLE THOMAS E. MCHUGH, Chief Judge, THE HONORABLE WILLIAM HERBERT BELCHER, THE HONORABLE PATRICK CASEY, THE HONORABLE ODEN F. GOSHORN, THE HONORABLE JOHN HEY, and THE HONORABLE A. ANDREW MACQUEEN, Judges of the Circuit Court of Kanawha County, West Virginia, and THE HONORABLE CLETUS B. HANLEY, Prosecuting Attorney of Kanawha County, West Virginia, *Respondents*

The Court having maturely considered the petition and exhibits the rule awarded thereon, respondents' demurrer to relators' petition, the argument and briefs of counsel thereon, and the brief Amicus Curiae of Juvenile Defender Attorney Program, is of opinion for reasons stated in writing and filed with the record that the relators are entitled to a writ of prohibition as prayed for in their said petition. It is therefore considered and ordered by the Court that a writ of prohibition do issue, directed to the respondents, The Honorable Robert K. Smith, The Honorable Thomas E. McHugh, Chief Judge, The Honorable William Herbert Belcher, The Honorable Patrick Casey, The Honorable Oden F. Goshorn, The Honorable John

Hey, and The Honorable A. Andrew MacQueen, Judges of the Circuit Court of Kanawha County, West Virginia, and The Honorable Cletus B. Hanley, Prosecuting Attorney of Kanawha County, West Virginia, restraining and prohibiting them from taking any further action against the petitioners by reason of Indictment No. 85, more fully set out and described in the petition herein, excepting only such order or action as may be appropriate to void said indictment and to restore the criminal records of each of the petitioners to their former status as if said indictment had never been returned; in accordance with the principles stated in the written opinion aforesaid and further according to law.

The syllabus of points adjudicated, prefixed to the written opinion prepared by Justice Neely, was concurred in by Chief Justice Caplan, Justice Harshbarger, Miller and McGraw.

The service of an attested copy of this order upon the respondents aforesaid shall have the same effect as the service of a formal writ.